

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.16 OF 1994
IN
CHAMBER SUMMONS NO.242 OF 1988
IN
SUIT NO.5624 OF 1953

Laxmidas T. Merchand & Anr.Appellants

V/s.

Ramdas Gayadin & Ors.Respondents

Ms.Rina K. Pujara for the Appellant.

Mr.R.R. Arolkar for the Respondents.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 8TH APRIL, 2005.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

This is an Appeal filed by the Plaintiffs against the order of the learned single Judge passed in the Chamber Summons taken out by Respondent Nos.1 to 6 and/or their heirs. Respondent Nos.4 and 6 are now represented by their respective heirs. Respondent Nos.7 to 11 are the original Defendants (wrongly described in the Memo of Appeal as original Applicants/Claimants). For convenience we will refer to Respondent Nos.1 to 6 as the Applicants and

Respondent Nos.7 to 11 as the Defendants.

2. The above Chamber Summons was taken out by the Applicants under the provisions of Order 21 Rule 99 of the Code of Civil Procedure for a declaration that the consent terms dated 27.11.1978 between the Appellants and the Obstructionist Nos.1 to 130 therein filed in Chamber Summons No.566 of 1977 in the above suit are not binding upon the Applicants and for order directing the Appellants/Plaintiffs to restore to the Applicants their original premises described in Annexure-1 to the Chamber Summons and in the alternative for an order directing the Appellants to provide alternative premises of similar area in the proposed new building.

3. It is necessary at the outset to state the facts leading to the Applicants filing the above Chamber Summons in which the impugned order and judgment was passed.

Appellant No.1, M.H. Sampat and original Plaintiff No.2 were the owners of the property admeasuring 3000 sq.yards at Lower Parel, Mumbai. The present Appellant No.2 is the son of original Plaintiff No.2. There were admittedly a number of

tenants on the property each of whom occupied separate hutments/structures.

. In 1948, the Appellants filed 162 suits in the Small Causes Court for evicting the tenants on the said property. The Appellants obtained decrees in these suits and these decrees were executed and the Appellants allegedly recovered the possession from the said tenants. On the intervention of one Purushottam Trikamdas, the Plaintiffs agreed to give a portion of the land on leave and licence basis to the said tenants. It was contended before the learned single Judge as well as before us that the Plaintiffs did so on the condition that all such persons would be represented by five persons namely the Defendants. We shall deal with this a little later while considering the disputes between the parties.

4. On 25th June, 1953, the Appellants filed the above suit against Respondent Nos.7 to 11. The Appellants' case was of having entered into an agreement dated 16th December, 1948 with the Defendants wherein the Appellants permitted the Defendants to use 2000 sq.yards on the said property on leave and licence basis reserving to themselves the right of changing the space so permitted to be used

within the aforesaid property and certain other rights as well. It is pertinent to note that there is nothing in the said agreement which reflects on the rights of any other persons in, to, upon or in respect of the structure occupied by the said other persons on the said property. The Plaintiffs contended that the Defendants put up some unauthorised structures on the said property and failed to pay compensation in terms of the said agreement dated 16th November, 1948. The Appellants accordingly terminated the said agreement and served a notice calling upon the Defendants to vacate the said property. The Appellants filed the above suit and sought a declaration that the Defendants were trespassers on the said land and the Defendants be ordered and decreed to remove themselves and their belonging on the said land and that the Defendants and their servants and agent be permanently restrained from entering upon or remaining on the said land. It is pertinent to note that there are no averments in the plaint to the effect that the Defendants therein were sued not merely in their personal capacity but as representing the interest of any other persons. Nor is there any reference to the alleged agreement that the Defendants represented any other persons on the property. Leave under Order 1 Rule 8 of the Code of

Civil Procedure was not sought. There is no averment to the effect that any other persons including the Applicants agreed to be represented by and or to be bound by the acts and deeds of the Defendants.

5. On 5th January, 1954, an ex-parte decree was passed against Defendant Nos.1 to 4 and a decree on admission was passed against Defendant No.5. By the said decree, the Defendants and their representatives, servants and agents were ordered forthwith to remove themselves and their belonging from the said property and to pay the compensation and mesne-profits mentioned therein. The expression "their representatives, servants and agents" was relied upon by Ms.Pujara, the learned counsel appearing on behalf of the Appellants to contend that the same would bind the Applicants. We will deal with this contention later.

6. The learned single Judge observed that after the aforesaid decree was passed, the Appellants accepted the compensation and issued the receipts in respect thereof directly to numerous occupants on the said property. The Appellants did not have the decrees executed immediately. They merely renewed the same from time to time. It was only 7th September,

1999 that the writ of possession was issued by this Court on the application of the Appellants. The execution thereof was obstructed by a number of persons claiming to be tenants.

7. On 10th October, 1977, the Plaintiffs took out Chamber Summons No.560 of 1977. The said Chamber Summons was in the nature of obstructionist proceedings against 130 persons on the said property who had obstructed the warrant of possession sought to be executed on 13th September, 1977. The Appellants had accepted the compensation after the said decree was passed on 5th January, 1954 inter-alia from these 130 persons. They also accepted the compensation from the others. The said 130 persons filed suits in the Small Causes Court for a declaration that they were the tenants in respect of the structures on the said premises in their occupation.

8. By an order dated 27th November, 1978, a consent order in terms of the consent terms signed by the counsel was passed. The said order also granted by consent, leave to the Appellant to amend the Chamber Summons adding certain parties to the Chamber Summons. Clause 1 reads as under :-

"1. The Plaintiffs hereby undertake to this Hon'ble Court to construct not less than 130 tenements each admeasuring 12'x9' with water top in each tenement with adequate sanitary blocks on the suit property and allot each of the 130 Obstructionists mentioned in Annexure 'A' hereto whose passport photographs will be given to the Plaintiffs before they vacate as provided in clause No.4 hereof and one tenement out of the said 130 tenements so constructed in accordance with the plan hereto annexed and marked Exhibit 'B' subject to the minor alternations by the Bombay Municipal Corporation and other local authorities."

. The rest of the terms also clearly pertain only to 130 persons who are added as parties to the Chamber Summons as amended. It is not necessary to set out all the terms which inter-alia pertained to a reference to the suits filed by the 130 obstructionists, undertakings by 130 obstructionists to vacate the suit premises, undertakings by the Appellants to given them alternate accommodation admeasuring not less than 12'x9' and certain other necessary amenities. Through inadvertence two clauses

in the terms are numbered 8, the first of which reads as under :-

"8. These Consent Terms are binding on the Plaintiffs their heirs, legal representative and/or administrators of the Plaintiffs abovenamed and the Obstructionists mentioned at the said Annexure 'A'."

9. Suffice it to note at this stage that the undertakings given in the consent terms would only bind the parties thereto. There is nothing in the consent terms to suggest that they were given by the parties thereto for and on behalf of any other person or persons. The Applicants were not parties to the consent terms. As stated above, the Chamber Summons was amended by furnishing a new list of 130 obstructionists. The Applicants were not the obstructionists either in the original list or in the amended list. The learned single Judge has referred to the fact that some of the obstructionists mentioned in the original list had expired. But their heirs were not brought on record and all that was done is that a new list of obstructionists was introduced by virtue of the amendment. The irregularity in the procedure however is not of any relevance so far as

the rights to the Applicants before us in the present matter are concerned.

10. On 6th April, 1989, the property was declared a slum area under the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as "the said Act"). That order however, was set-aside by order dated 9th December, 1983. It is pertinent to note that in the proceedings before the authorities under the said Act the Deputy Collector had pointed out that as per the census carried out, 175 persons occupying independent structures were found on the property and that only 130 of them were parties to the said consent terms dated 27th November, 1978. It is important to note that at the time of hearing of the Appeal, the Appellants conceded that there were 181 hutments on the said structure. It is true that they contended that occupants of 11 structures from that list were to be provided with accommodation in the proposed new construction. What is more important is the fact that the Appellants also stated that four others were also to be provided accommodation in the proposed new building. The Appellants also contended that 9 hutments were on the municipal land and not on the suit property and that 2 hutments were in occupation

on the Rent Collector and 5 others had been allowed to put up their hutments temporarily by the Appellants. That according to the Appellants the said other persons were not in possession of the structures on the suit property is another matter altogether. It is important to note that even according to the Appellants, there were more than 130 structures on the suit property. Lastly it is important to note the following observations of the said order of the Slum Tribunal, which reads as under:-

"Now it is evident that almost all the occupants for whose benefit a declaration was made, were a party to the suit which was pending before the High Court and that consent terms have been filed in their suit".
(emphasis supplied)

11. Accordingly, the declaration dated 6th February, 1980 were set aside. As per the undertakings contain in the said consent terms dated 27th November, 1978 only 102 of 130 obstructionists therein vacated the said property. The Appellants took out Notice of Motion No.174 of 1984 against the remaining 28 obstructionists for failing to comply with the undertakings given by them. By an order

dated 12th March, 1984, the Notice of Motion was made absolutely. The Applicants were not parties to the Notice of Motion. Ms.Pujara admitted that there is no mention regarding the Applicants in the said order dated 12th October, 1984 either.

12. As the said 28 obstructionists did not hand over the possession despite the aforesaid undertakings and the said order dated 12th October, 1984, the Appellants filed Notice of Motion No.2699 of 1984. The said Notice of Motion was filed for committing the said 28 obstructionists who were Respondent Nos.1 to 28 to the said Notice of Motion, under the Contempt of Courts Act for violating the order dated 12th October, 1984 and the undertakings recorded therein.

13. The present Applicants were thereafter joined as Respondent Nos.29 to 34 to the said Notice of Motion No.2699 of 1984. By an order dated 27th February, 1985, 28 obstructionists were ordered to vacate the premises with their belonging. An officer of this Court was directed to make a report. Upon consideration of the reports of the Officers of this Court,an order dated 4th April, 1985 was passed appointing the Court Receiver with power to forcibly evict the said 28 obstructionists, if necessary with

the held of police.

14. As the said 28 obstructionists had failed to hand over possession in compliance with the order dated 12th October, 1984, the representative of the Court Receiver along with Appellant No.2 visited the said property on 20th April, 1985 at 2.30 p.m. along with 25 police constables and five police officers and the contractor with his 200 workmen. They started destroying the structure of the said 28 obstructionists. That was a matter between the said 28 obstructionists and the Appellants. However, during that visit, the said persons also started destroying other structures including the structures of the Applicants. The Applicants made various allegations against the representative of the Court Receiver. They stated that they enquired of the Court Receiver whether there was any order permitting him to demolish their structure but that the representative of the Court Receiver stated that though there was no specific order, he had given instructions to destroy their structures as well. Within an hour even the Applicants structures were demolished and their articles and documents were lost and destroyed. The Applicants were also forcibly dispossessed and removed from the said property. The Applicants lodged a

police complaint.

15. On 20th February, 1986, the following order was passed by this Court on the Applicant's application :-

"1. The six Applicants/Respondent Nos.29 to 34 will put up at their own cost temporary hutments each of maximum area of 12' x 12' at such place or places to be nominated by the Plaintiffs adjacent to the temporary sheds put up by the committee members as per Consent Terms dated 27th November, 1978 (Clause 9) within two weeks from the date that the Plaintiffs nominate the place and the Applicants/Respondent Nos.29 to 34 shall shift from their present place.

2. The Plaintiffs shall be at liberty to shift the said temporary sheds at Plaintiffs' cost and expenses from place to place in view of the construction of the 130 new tenements.

3. The Applicants/Respondent Nos.29 to 34 undertake accordingly.

4. The Applicants/Respondent Nos.29 to 34 undertake to Court that in the event of their failing in their obstruction application filed in this Hon'ble Court, they will forthwith demolish and/or remove the temporary sheds referred to in Clause 1 above and shall leave the land along with their belongings etc.

5. The Plaintiffs undertake to Court that in the event of the applicants/Respondent Nos.29 to 34, succeeding in the obstruction application, the Plaintiffs will provide tenements in the newly constructed building housing 130 new tenements or provide some other similar accommodation as may be directed by the Court and on the same terms and conditions as are applicable to the 130 new tenements.

6. Applicants/Respondent Nos.29 to 34 shall not in any manner obstruct the construction on the new building for 130 tenements or any other building on the said land.

7. Suit Nos.3447 of 1985, 3448 of 1985, 3449

of 1985, 3450 of 1985, 3451 of 1985 and 3452 of 1985 pending in the Small Causes Court at Bombay shall be stayed and shall abide the result of this Notice of Motion and the Obstruction Application in this Court.

8. Undertakings accepted, Discovery and inspection forthwith hereafter. Notice of Motion and Obstruction Application adjourned to for recording evidence.

Liberty to apply."

. It was only thereafter that Notice of Motion No.2699 of 1984 was amended by adding a prayer to evict the Applicants and an order was sought against them to remove themselves from their hutments which had already been demolished.

16. Ultimately Notice of Motion No.2699 of 1984 was disposed of by an order dated 3rd March, 1988. The learned single Judge after referring to the above facts, declined to take any action for Contempt of Court against the original Respondent Nos.1 to 28.

The learned single Judge recorded that the learned counsel appearing on behalf of the Appellants contended that the question as to whether the Applicants i.e. Respondent Nos.29 to 34 to the said Notice of Motion should be evicted from the premises should be examined in the Notice of Motion itself. The learned single Judge declined to do so. The learned single Judge directed the Applicants to take out a Chamber Summons observing that on such Chamber Summons, evidence can be recorded and final adjudication can be made which would amount to a decree.

. The undertakings given by the applicants as recorded in the order dated 20th February, 1986 reproduced by us above was ordered to continue to operate till the final disposal of the proposed Chamber Summons to be taken out by the Applicants.

17. It is in these circumstances that the present Chamber Summons was taken out by the Applicants on 9th March, 1988.

The Applicant's case is that they were not parties to the consent decree dated 27th November, 1978 which was entered into between the Appellants and the said

130 obstructionists ; that they had their own independent tenements on the said property ; that there is a landlord and tenant relationship between the Appellants and themselves ; that they had paid monthly rent for the said tenements to the Applicants ; that they were in exclusive possession of their premises till they were forcibly dispossessed by the Court Receiver and that they were never judgment debtors themselves nor represented by the said judgment debtors.

18. The Appellants denied that the Applicants were their tenants. The Appellants case is that the Applicants resided with some of the 130 obstructionists with whom they were related. The Appellants have contended that there were only 130 and not 181 hutments dwellers on the suit property. As regards the order of the Slum Tribunal, the Appellants stated that what is stated in the order of the Commissioner recorded therein was incorrect. Before us it was contended by Ms.Pujara that the Defendants to the suit were in fact represented by hutment dwellers on the said property including the Applicants even assuming that the Applicants occupied independent structures.

19. The learned single Judge framed the following issues :

ISSUES

- 1). Whether the Applicants are the tenants of the Plaintiffs in respect of their individual tenements or huts as alleged in the Affidavit support of the Chamber Summons ?
- 2). Whether the Applicants are entitled to a declaration that the consent terms dated 27th November, 1978 are not binding upon them ?
- 3). Whether the Applicants are entitled to alternative premises of similar area in the proposed new building ?
- 4). What reliefs the Applicants are entitled to ?

. The learned single Judge answered the issues as follows :-

Issue No.1 : In the affirmative as regards Applicant Nos.1, 3, 4, 5 and 6 and in the Negative as regards

Applicant No.2.

Issue No.2 : In the affirmative.

Issue No.3 : In the affirmative.

Issue No.4 : As per order set out hereafter.

20. We are in respectful agreement with the findings, reasonings and decisions of the learned single Judge. We however refrain from expressing a final view on the question of the Applicants tenancies in respect of their structures as the point does not arise in these proceedings for final determination. Suffice it to state that the finding of tenancy prima-facie appears to be correct. We have kept this question open to be decided finally in appropriate proceedings, if any, are adopted.

21. Before dealing with each of the issues and the case of each of each of the Applicants, it is necessary to deal with the submissions to the effect that whatever be the finding on merits the Applicants are bound by the decrees passed against the Defendants as the Defendants represented the Applicants. The submission is totally unfounded. The second aspect pertains to the number of hutments on the said premises.

22. It is settled law that a decree is binding only between the parties to the proceedings. This is so even if it is a consent decree. The plain reading of the plaint makes it clear that the Defendants were not sued in a representative capacity. No leave under Order 1 Rule 8 of the Code of Civil Procedure was sought. There is no averment in the plaint to the effect that the Defendants represented the hutment dwellers on the property. Even assuming that the said averment was made no evidence, oral or documentary, to that effect was adduced. It is important to note that there is nothing on record to suggest that the Applicants conceded to this position. The Applicants were not parties to the suit. They therefore, cannot be bound by any proceedings, orders or the decree in the suit. The Applicants are not bound by the orders passed in the subsequent proceedings in the above suit and the orders passed therein whether by consent or otherwise. This is for the reason that the Applicants were never made parties to the said proceedings except by virtue of an amendment to the said Notice of Motion No.2699 of 1984. The Applicants were neither parties to nor given notice of any of the applications made in the said proceedings. By no stretch of imagination are they bound by the orders passed in the said proceedings.

23. The consent terms were entered into with the said 130 obstructionists who admittedly did not include the Applicants. The Plaintiffs right to enforce the consent terms can only be against the said 130 obstructionists and the structures in their occupation. At the highest, the rights against the persons other than the 130 obstructionists would be against such other persons who were residing in the structures belonging to the 130 obstructionists without themselves having any right, title or interest in respect of the said structures themselves. In other words, at the highest the Plaintiffs case could have been that the Applicants were put in possession of the very site of the said 130 obstructionists and that therefore they were entitled to execute the consent terms against them. To establish such a right, it was necessary for the Plaintiffs to correlate the structure in the occupation of each of the said Applicants to the structures of one of the said 130 obstructionists in Chamber Summons No.560 of 1977.

24. No such case has been established by the Appellants. On this ground alone, the Plaintiffs must fail qua the Applicants.

25. The Applicants' case is further supported by the fact that there clearly were more than 130 structures on the property at the material time. This is apparent from various circumstances :

a). Firstly, as we have already mentioned, in 1948, the Appellants had filed 162 suits in the Small Causes Court and obtained decrees for eviction therein. They alleged that because of the intervention of one Purushottam Trikamdas, the tenants were agreed to be allowed to occupy a part of the land. As observed by the learned single Judge, neither in the affidavit nor in the evidence is there any statement that all 162 persons did not return to the said land. We are in agreement with the learned single Judge that this circumstance indicates that more than 130 occupants returned to the suit land and put up and occupied structures thereon.

b). We are also in respectful agreement with the learned single Judge in refusing to accept the Appellant's case that between 1949 and 1954 they collected the rent only from the said five alleged representatives against whom the above suit had been filed. The Appellants clearly admitted that they have

no personal knowledge as to the number of persons from whom these five alleged representatives collected the compensation. Nor is there any evidence to suggest that the Appellants had any personal knowledge as to the exact number of structures on the suit property.

c). As recorded by the learned single Judge, Chamber Summons No.560 of 1977 was filed against 130 persons. The Chamber Summons was amended by substituting a fresh list of 130 persons. The names in the original list and in the new list did not tally. Undoubtedly, 26 persons mentioned in the list had expired. Their heirs were not on record. That however is a different matter. What is also important however is that in the new list, certain names from the original list were deleted and these persons were in fact live at the time the consent terms were executed. This indicates quite clearly that there were more than 130 persons involved in the case. The least that can be said in favour of the Applicants is that these are circumstances which ought to have been explained by the Appellants. The Appellants offered no cogent explanation for the same. Without such explanation, it is impossible to hold that the consent terms bind the Applicants.

d). The evidence further established the names of at least seven persons, who were also occupants on the suit land. These seven persons were not in the list of 130 persons involved in Chamber Summons No.560 of 1977.

e). Before the Slum Authorities, the Slum Inspector had given evidence. He stated that before an area is declared as a slum, the surveyor visits the site and prepares a report. In the case of the suit land, the report indicated that at the time of survey there were 178 huts on the suit land. In the Appeal filed by the Appellants before the Tribunal, the Collector produced a list of 181 tenants. Applicant No.1 in his examination-in-chief expressly stated that the authority under the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971, numbered all the huts. We do not see any cross-examination in rebuttal of this evidence by the Appellants.

. It is important to note that this list included the names of Applicant Nos.1, 3, 4, 5 and 6. In the affidavit filed before the Tribunal, the Appellants contended that a number of huts were being occupied by the relatives of 130 persons mentioned in

the consent terms. However, significantly the Applicants were not shown as residing with their relatives. Their names were shown independently in the consent terms. This fact to our mind clinches the issue in favour of the Applicants.

f). Finally, it is not without significance therefore that in the said consent terms in Chamber Summons No.560 of 1977, the Appellants agreed to construct "at least" 130 tenements if in fact there were 130 tenements. There was no occasion for the use of expression "at least" in the Chamber Summons. Thus even according to the Appellants there were more than 130 structures on the suit land at the relevant time.

26. We are in respectful agreement with the learned single Judge that the aforesaid facts established that the Plaintiffs' case that there were 130 huts on the suit land is unsustainable.

27. We will now consider as did the learned single Judge, the case of each of the Applicants. Before doing so, however, we would reiterate that the above Chamber Summons is liable to be dismissed on the above findings itself. For the Plaintiffs have failed to establish that by virtue of the said consent terms or

otherwise, they were entitled to evict, through the Court Receiver, the Applicants. The learned single Judge has come to the conclusion that the Applicants were tenants in their own rights and for that reason also they could not be evicted from their huts. We would however clarify that in view of the above findings and in view of our findings on facts which we shall now proceed to state, irrespective of the findings on tenancy, the Applicant could not have been evicted through the Court Receiver in execution/enforcement of the said consent terms.

RE: APPLICANT NO.1

28. Applicant No.1 contended that he had been staying on the suit land since 1957. He deposed that the premises were given to him by the first Appellant in consideration of payment of Rs.10/- per month by him. It is also important to note that the examination-in-chief of Applicant No.1 sets out the facts leading to the allotment. He has done so in considerable detail mentioning the name of the person who took him to the Appellants, the details of the conversation with the Plaintiff, the name of the rent collector, the name of the person who took him to the site and permitted him to construct the structure and

the dimensions of the structure. The cross-examination does not rebut any of this evidence effectively. Having read the evidence as a whole, we are inclined to accept the deposition of Applicant No.1 in this regard.

29. He also deposed that the Appellants had made a proposal that if each of the tenant paid Rs.250/- the Appellants would construct a building and accommodate the inhabitants of the structures therein. He stated that pursuant thereto he paid a sum of Rs.150/- to the Appellants. He also produced a receipt in evidence thereof which was admitted by the Plaintiff. The Plaintiff's case however is that the receipt was issued not to Applicant No.1 but to one Buwa. The Plaintiff however did not produce the counterfoil to establish this case despite having produced numerous other counter-foils.

30. Applicant No.1 also produced the birth certificate of his children who were born while he was residing in the said structure and a ration card evidencing his residence therein. As rightly observed by the learned single Judge this by itself however does not assist Applicant No.1 to great extent inasmuch as the fact that he was residing in the

structure is not denied. What was contended on behalf of the Plaintiff was that he resided alongwith one Maya Ghodake. In cross-examination, the case put to Applicant No.1 was that the Appellants had adopted obstructionist proceedings against the said Maya Ghodake. Applicant No.1 stated that that may have been so but denied in particular having stayed with her.

31. In this regard, it is significant to note the evidence of the Plaintiff's witness one Waman Kamble. This witness of the Plaintiffs was the president of the chawl committee and purported to know the details of the inhabitants of the said property including the structures occupied by them. The following portion of his evidence supports substantially the evidence of Applicant No.1 that he was residing separately. The same reads as under :

"I know Mr.Govind Gopal Jadhav. Long ago when he was very small he was staying with his stepfather. After his marriage he was residing separately. The name of his step-father was Mr.Ghintu Kondiram Ghodke. Mr.Chintu Kondiram Ghodke was popularly known as Buwa. Mr.Govind Gopal Jadhav must have been residing in Pathan Chawl since round about 1950-51.

Witness adds: After marriage he was residing in this Chawl separately.

Examination-in-Chief continued.

I do not remember since which year he has been residing separately. I cannot say for how many years he stayed separately in the other hut. I do not know whether Mr. Govind Gopal Jadhav was evicted from the separate hut. I do not know whether Govind Gopal Jadhav was a tenant of the separate hut." (emphasis supplied)

32. It is pertinent to note that there was no re-examination of this witness on this aspect. It is also pertinent to note that this witness was not even sought to be declared hostile by the Appellants. In the circumstances, it is clearly established that Applicant No.1 resided in the structure in his occupation separately and in his own right.

33. In this background, what assumes significance is the fact that Maya Ghodake was never a tenant of the Plaintiff. In the original list annexed to the Chamber Summons No.560 of 1977, her name did not appear. Her name was substituted in the fresh list we have referred to earlier. We are therefore inclined to accept the finding of the learned Judge that her name was substituted because she agreed to enter into the said consent terms with the Plaintiffs. The

original list to the Chamber Summons showed the name of the said Buwa as a tenant. It is significant that though he was alive at the time when the consent terms were entered into, his name was dropped and Maya Ghodake's name was substituted.

34. In the circumstances, we confirm the finding of the learned single Judge that Applicant No.1 had an independent hut and resided therein in his own right.

RE : APPLICANT NO.2

35. Applicant No.2 did not appear before the learned single Judge. He did not appear before us either. The Chamber Summons was not pressed as against him. It is therefore not necessary to deal with the case regarding Applicant No.2.

RE : APPLICANT NOS.3 AND 4

36. Applicant Nos.3 and Original Applicant No.4 i.e. Respondent No.3 and Original Respondent No.4 viz. Bharat Shankar Kamble and Sadashiv Shankar Kamble were brothers. Respondent Nos.4(a), 4(b) and 4(c) are the heirs of Applicant No.4. The reference to Applicant

No.4, for convenience, shall mean his heirs - Respondent Nos.4(a), 4(b) and 4(c).

37. The case of Applicant Nos.3 and 4 is that their father Shankar Kamble was the tenant of the Appellants. There is no dispute that Shankar Kamble was the tenant of the Appellants. According to Applicant Nos.3 and 4 their father occupied three separate structures. According to the Appellant, he occupied only one structure. The Applicant's case is that after their father expired one hut each was given to their elder brother Ankush and to themselves. According to them, thereafter, they independently paid rent to the Appellants in respect of the huts in their occupation. In their examination-in-chief both the Applicants have set out the background of the manner in which the structures were allotted to and occupied by them. They have given the details, as to Applicant No.1, in this regard. There is nothing to suggest that the evidenced is false.

38. Applicant No.3 married in the year 1963 and was thereafter allowed to occupy one of the structures independently. They have referred to the rent receipts and stated that the same were destroyed when their huts were demolished. For the same reasons, as

recorded by the learned Judge, we are inclined to accept their case in this regard. The following factors further support their case.

39. The list prepared by the slum authorities includes the names of the three sons as occupying independent huts. We have already dealt with the manner in which the list was prepared and the deposition in regard thereto which establishes the facts stated therein.

40. The Appellant's reliance upon the fact that the eldest brother Ankush had signed the consent terms can be of no assistance in the above circumstances to their case. He did sign the consent terms but the question which falls for consideration is whether his act of signing the consent terms would bind his brothers Applicant Nos.3 and 4. This question is answered by considering whether Applicant Nos.3 and 4 occupied independent structures. We have held that they did. Let us for a moment assume as did the learned single Judge, that Ankush signed the consent terms in respect of the structure occupied by him and further assume that Applicant Nos.3 and 4 also resided in the said structure. Upon the death of the father would arise the question who would be entitled to the

tenancy rights in respect thereof. The learned Judge has held that all three brothers would be entitled to the tenancy rights in respect of the said structure. We will go a step further and assume that only one of them will be entitled to be recognised as a tenant. Even this would not carry the Appellant's case further. Admittedly, neither Applicant No.3 nor Applicant No.4 consented to their father's name being substituted in the list annexed to the Chamber Summons with the name of their brother Ankush. It is not for the Appellants to decide as to which of the heirs is entitled to be recognised as a tenant. In the circumstances, the reliance upon the execution of the consent terms by Ankush, cannot carry the Plaintiff's case any further.

41. The electoral rolls also state the numbers of both the huts. The ration cards which have also been received in the evidence indicate separate huts.

42. We are also in respectful agreement with the finding of the learned Judge in favour of these Applicants based upon the report of the representative of the Court Receiver during his visits to the site on 3.3.1985, 18.3.1985 and 23.4.1985 pursuant to the orders of this Court dated 27.2.1985 and 11.3.1985.

According to the Appellants and the representative of the Court Receiver, Ankush's hut had already been demolished as per the report dated 3.3.1985 and he allegedly handed over possession to the Court Receiver's representative. On the subsequent visit on 23.4.1985 these Applicants opposed the demolition of their huts. The Appellants however insisted that these Applicants were merely staying with Ankush. Where was the question as stated by the learned single Judge, of these Applicants objecting to the demolition of their huts on the ground of their occupying Ankush's hut if Ankush's hut had already been demolished on the earlier visit. The Court Receiver's representative was examined. He admitted that two separate huts occupied by these Applicants were demolished. Thus, as rightly held by the learned single Judge, under the guise of executing the orders against Ankush, the structures of these Applicants were illegally demolished.

43. These Applicants in their evidence described the precise location of their huts. Two huts were next to each other at a distance of 8 - 10 ft. The third was opposite these huts. Neither the cross-examination nor any other satisfactory evidence has been adduced indicating this evidence to be incorrect. Nor is

there satisfactory evidence to indicate that there was only a single hut. Much less was any evidence to indicate that the single hut was divided into three rooms by the Applicants. In the cross-examination of these Applicants, there is no suggestion to this effect either. Moreover, the evidence of these Applicants regarding the numbering of the huts is convincing. The number in respect of one of the huts was changed often. The other did not have any number. The slum authorities numbered their huts separately.

44. In the circumstances, we are in agreement with the learned single Judge that these applicants occupied independent premises.

RE : APPLICANT NO.5

45. Applicant No.5 claims to have been residing in the said premises with his father since 1960 when he was about six to seven years old. He deposed that his father used to pay rent of Rs.12/- per month to the Appellants in respect whereof rent receipts were issued. It is true that he has stated that in 1977 his father resigned from his job and thereafter went to his native place. It is however pertinent to note that it is not the Appellants' case that the tenancy

stood terminated or was abandoned by this Applicant's father.

46. After 1977, this Applicant claims to have been residing in the said structure with his family. He deposed that though he offered to pay the rent, the Appellants' rent controller refused to accept the same. His mother, sister and other members of the family occasionally came to Mumbai and stayed with him in the said premises. It is pertinent to note that this Applicant also stated that in 1977, prior to going to his native place, this Applicant's father introduced him to the Appellants' representative and stated that the rent had not been collected. They were told that the rent would be collected but despite the same it was not collected.

47. The Applicant has relied upon various documents which showed his possession. It is important to note that the Appellants themselves have come out with contradictory statements regarding this Applicant's possession of the structure. That the Applicant resided in the said property is not seriously disputed. What is alleged on behalf of the Plaintiffs is that he did not occupy the same independently. The Appellant's case however is full

of contradictions. As noted by the learned single Judge, in paragraph 9 of the affidavit in reply the Appellants alleged that Applicant No.5 resided with his uncle one Jagdish Jiten. However, in evidence they claimed that he was residing with his uncle Ramsharan Matabadal. The Plaintiffs' other witness contended that Applicant No.5 was residing with one Ramsharan Matabadal. Thus, as held by the learned single Judge, the Plaintiffs were unable to show with whom Applicant No.5 was residing. We are in respectful agreement with the learned single Judge that considering the evidence as a whole, there was no reason not to accept this Applicant's testimony.

48. The Appellants failed to establish that in respect of the said structure Matadin was the tenant. They did not produce any rent receipts to establish the same though called upon to do so. Further in the original list to the Chamber Summons, neither Matadin nor Mata Badal's names appeared. Thus, as held by the learned single Judge their names were included in the fresh list apparently because they agreed to sign the consent terms.

49. In the circumstances, we uphold the finding that Applicant No.5 occupied the structure

independently of others and in his own right.

RE : APPLICANT NO.6

50. The Appellant's case in paragraph 9(e) of the affidavit in reply is that the Applicant No.6 resided in the structure occupied by his father-in-law Mohan Shankar Kamble. Admittedly Mohan Shankar Kamble was not the Plaintiffs' tenant. The original tenant was one Shrawan Kamble, who expired in 1968 leaving behind a widow and three children. Even after his death, the Appellants continued receiving the rent and issuing receipts in respect thereof in the name of Shrawan Kamble. The learned Judge held that the persons who occupied the structure after the demise of Shrawan Kamble were entitled to continue to reside in the premises. As observed by the learned Judge the only evidence before the Court is that Applicant No.6 had paid the rent. The learned Judge further held that even assuming that this Applicant resided with the said Mohan Shankar Kamble, the Appellants were not entitled to evict Applicant No.6 and demolish his structure in purported enforcement of the consent terms and the said orders for it is admitted that Applicant No.6 was not a party to the same. We are in respectful agreement with the learned Judge. Whatever

rights the Appellants may have had or have against Applicant No.6, the same must be enforced in accordance with law and not in purported enforcement of orders passed in the proceedings to which Applicant No.6 was not a party.

51. Moreover as held by the learned Judge, before the Slum Tribunal the Appellants never contended that Applicant No.6 was staying with the said Mohan Shankar Kamble. Applicant No.6 had produced the documents in respect of his occupation of the said structure. The Court Receiver's report dated 30th August, 1985 also supports his case in this regard. We are therefore in respectful agreement with the learned Judge that Applicant No.6 also occupied a separate hut and therefore, could not be evicted in the manner sought to be done.

52. It would be convenient to consider issue No.2 first. The consent terms cannot and do not bind or affect Applicant Nos.1, 3, 4, 5 and 6 in any manner whatsoever inter-alia in view of the fact that they were never parties to Chamber Summons No.560 of 1977 and in view of the fact that it is established by each of them (except Applicant No.2) that they occupy a separate structure in their individual rights.

Accordingly issue No.2 is answered in the affirmative qua Applicant Nos.1, 3, 4, 5 and 6 and in the negative qua Applicant No.2.

53. In this view of the matter, we answer issue No.1 in the affirmative as regards Applicant Nos.1, 3, 4, 5 and 6 and in the negative as far as Applicant No.2 is concerned with the qualification that this finding is only prima-facie and for the purpose of these proceedings. The question of the tenancy of Applicant Nos.1 and 3 to 6 is kept open to be decided finally in appropriate proceedings, if any, are adopted.

54. Issue Nos.3 and 4 have been answered by the learned Judge in accordance with the earlier orders of this court and in accordance with the above findings. We reproduce below the judgment of the learned Judge in so far as Issue Nos.3 and 4 are concerned and confirm the same in their entirety.

"Issue No.3 : On or about 20th February, 1986 the Plaintiffs have given an Undertaking to this Court that in the event of the Applicants succeeding in their Application, the Plaintiffs will provide tenements in the newly constructed building or provide some other similar accommodation as may be directed by the Court, on the same terms and conditions as are applicable to the 130 new tenements. In view of this undertaking and in view of the facts that the Applicants have established that they were residing in their

individual tenements, the Plaintiff is bound to provide alternate premises. Accordingly, this Issue has been answered in the Affirmative.

Issue No.4 : Accordingly, I declare that the Applicants were tenants of the Plaintiffs in respect of the Individual tenements or huts and that the Plaintiff is bound to provide to the Applicants tenements of not less than 12' x 9' with adequate sanitary blocks as required by the Bombay Municipal Corporation and on a rent which shall not be more than Rs.35/- per month inclusive of all taxes including property tax. Any increase in taxes to be borne by the Applicants. Such new tenements to be provided by the Plaintiff within a period of one year from today. Till the Plaintiff provides such new tenements the applicants are permitted to continue to reside in the huts constructed by them pursuant to Order dated 29th March 1986."

55. The order and judgment of the learned single Judge is confirmed and the Appeal is dismissed subject to the above clarification and the above findings and directions. The Appellants shall pay the costs of this Appeal fixed at Rs.5000/- to Respondent Nos.1, 3 and 5. The Appellants shall also pay the costs of an aggregate amount of Rs.5000/- to Respondent Nos.4-A, 4-B and 4-C. The Appellants shall also pay the costs of an aggregate amount of Rs.5000/- to Respondent Nos.6-A, 6-B and 6-C.